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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA,
Petitioners,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, ET AL.
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioners are tempted (as no doubt many petitioners are) to point out in reply to the Opposition Briefs many distortions and misrepresentations of our position; our arguments are easier to answer if they are first represented to be different from what they actually are. We shall trust that the Court under-

stands what we said in the Petition, as distinguished from what Respondents say we said.

Accordingly this Reply is limited to a brief clarification of our position on only two items.

I.

UNCONSTITUTIONALITY OF P. L. 88-108 WAS NOT AVAILABLE AS A GROUND OF IMPEACHMENT OF THE AWARD UNDER SECTION 9 OF THE RAILWAY LABOR ACT OR P. L. 88-108.

In seeking to sustain the decisions of the courts below the carrier respondents first cite a series of decisions of this Court on the three-judge-court requirement (Car. Br. pp. 22-24) none of which holds what it is represented as holding; then *Coffman* v. *Breeze Corp.*, 323 U.S. 316 is claimed (Car. Br. p. 26) to be consistent with the doctrine the carriers distill from these alleged holdings by ignoring the fact that the district court in that case dismissed the action for want of a justiciable controversy and lack of equitable grounds for relief. If the carriers were right in the doctrine they expound, this Court would not have held that a three-judge-court was required and that this Court therefore had jurisdiction of the direct appeal, but rather that a single judge should have dismissed the case on the ground that there was no case for equitable relief and that the appellate route was through the court of appeals.

After this preliminary argument the carriers (Car. Br. pp. 27-32) turn to what seems to us to be their primary ground for supporting the denial of our motion for the convening of a three-judge district court, i.e., that unconstitutionality of P. L. 88-108 is an available basis for impeachment of the award and hence the suit, despite Count II of the complaint, is not really one to which 28 U.S.C. § 2282 applies. The Government respondents rest their support of the

jurisdiction of a single district judge (aside from substantiality of constitutional issues) entirely on this ground. (Gov. Br. pp. 14-19). It is this contention to which we now reply.

Section 9, Third of the Railway Labor Act (Pet. App. p. 30a) explicitly provides that a petition for impeachment of an award "shall be entertained *only* on one or more of the following grounds:" (emphasis supplied). The grounds that follow are clearly defined and specific; unconstitutionality is not one of them.

Although P.L. 88-108 contains a separability clause (Pet. App. p. 30a) it does not enlarge the grounds for impeachment of the award beyond those specified Section 9, Third of the Railway Labor Act. It cannot be inferred from this clause, as the carrier respondents do (Car. Br. p. 31) that this clause must by implication have expanded the grounds for impeachment, for there are other provisions of the statute other than those pertaining to arbitration that are of questionable constitutionality and obviously not subject to consideration in an impeachment proceeding.

Both groups of respondents (Car. Br. p. 30; Gov. Br. pp. 18-19) ascribe Judge Wright's dissenting opinion on the three-judge-court requirement to his mistaken impression that the impeachment proceeding was not reviewable in this Court,* and imply that we ourselves have substantially abandoned Judge Wright's

* In this connection it may be pertinent to observe that during argument in the court of appeals, in response to questions from Judge Wright, while carrier counsel gave the opinion that impeachment issues were reviewable here on *certiorari*, Government counsel was not prepared to take an official position but expressed it as his personal opinion that the court of appeals decision would be final and all impeachment issues and not subject to review in this Court.

opinion by demonstrating that this Court has jurisdiction to review the impeachment issues on *certiorari*.

We submit that a fair reading of Judge Wright's opinion (Pet. App. pp. 2a-4a) shows that he put primary reliance on the considerations we have stated above and the availability of review in this Court was only a supporting bolster. We further submit that a fair reading of our petition (pp. 28-29) shows that we addressed ourselves, in this respect, only to the effect of Section 9, Sixth of the Railway Labor Act on the review jurisdiction of this Court to review an impeachment proceeding and did not imply that constitutional issues could be raised in an impeachment proceeding.

II.

THE "ARBITRATION" IMPOSED BY P. L. 88-108 BEARS NO RESEMBLANCE TO VOLUNTARY ARBITRATION.

These observations are addressed to the Government respondents' brief (pp. 24-25) indicating that Congress, in imposing on petitioners the novel requirements of subjection of the conditions of employment to be determined by an unfettered *ad hoc* Board, was only giving statutory form to what the parties had agreed upon "in principle". By contrast, the carrier respondents (Car. Br. p. 5) treat this so-called agreement "in principle" as only a minor deviation from the petitioners' alleged rejection of everything anyone had proposed.

Regardless of how individual members of Congress, or committees, may have sought to reconcile the imposition of compulsory arbitration with their consciences or their constitutional principles, the Congress as a whole found (in the last recital of P.L. 88-108, Pet. App. p. 26a) that the petitioners had accepted an arbitration proposal "with certain reservations" and that the

"parties have been unable to agree upon the terms and procedures of an arbitration agreement."

Arbitration imposed by Congress on terms it outlined and with the latitude the courts below have given it cannot be defended as merely implementing something the parties had agreed to "in principle".

Respectfuly submitted,

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